DOLOMITE INDUSTRIES CO. SDN. BHD.

v.

SEET KIN SING

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 173 OF 1979]
6 FEBRUARY 1986

CIVIL PROCEDURE: *Claim for amount being balance for goods sold and delivered - Defence raised transaction null and void - In contravention of Moneylenders Act - Whether plaintiffs are entitled to charge interest on amount due - Plaintiffs' claim - Whether proven - Defendant - Whether has thrown any doubt on plaintiffs' claim.*

The plaintiffs in this case brought an action against the defendant for RM25,453.09 being the balance for goods sold and delivered. As a defence to the claim, the defendant contended that since the plaintiffs had imposed an interest charge of 1% per month on the sums due and owing, the transaction between the plaintiffs and the defendant was null and void, unenforceable and illegal being in contravention of the Moneylenders Act. The defendant also alleged that the plaintiffs had offered a 5% discount which the plaintiffs had not given to him and the defendant therefore counterclaimed for RM19,087.91 which he claimed he had overpaid the plaintiffs.

The defendant then amended the Statement of Defence to include a contention that when he made the purchase orders he had instructed that the goods supplied should be delivered in lorries belonging either to the plaintiffs or to one M/s. Leng Thong. The defendant also contended that goods, the subject of a number of Delivery Orders, were never received by him.

The plaintiffs submitted that it had been stated in the bills from the very beginning that interest would be charged on amounts unpaid for more than 60 days. There were no instructions that goods could only be delivered by lorries belonging to M/s. Leng Thong or the plaintiffs. The 5% discount was only subject to the fact that advance payments were made and in this case no advance payment had been made.

Held:

[1] Even if the plaintiffs were not entitled to charge interest their doing so does not entitle the defendant to get out of the liability in respect of any balance found for goods sold and delivered by any provision of the Moneylenders Act.

[2] The plaintiffs are entitled either by contract or by virtue of s. 11 of the Civil Law Act 1956 to interest at 1% per month on any amount due as from the date such amount was due until judgment and thereafter at the rate (of 6%) as prayed in the Statement of Claim.

[3] The defendant was entitled to a 5% discount if advance payments were made as per the term of the plaintiffs' letter dated 28 September 1978. Although the defendant contended that he had in fact been told verbally about this fact and that such an offer was not qualified by the letter, nevertheless it was on the basis of that letter that the defendant had based his cause of action for the 5% discount. There was no merit whatsoever in the claim for a discount.

[4] The plaintiffs have proven their claim and the defendant has not thrown any doubt on the plaintiffs' claim or on any part thereof.

[Judgment to plaintiffs as prayed. Counterclaim dismissed with costs.]

Cases referred to:
Wong Chong Chow v. Pan Malaysian Cement Works Bhd. [1980] 2 MLJ 75
Woon Hoe Kan & Son Sdn. Bhd. v. Bandaraya Dev. Bhd. [1974] 1 MLJ 24

Legislation referred to:
Civil Law Act 1956, s. 11

For the plaintiffs - Anusha Santhirasthipam; M/s. Shearn Delamore & Co.
For the defendant - Mahadevi; M/s. Mahadevi Nadchatiram & Partners

JUDGMENT

VC George J:

The plaintiffs' original claim was for RM25,453.09 being the balance for goods sold and delivered.

By the statement of defence dated 1 October 1979 the defendant complained that the plaintiffs had "imposed an interest charge of 1% on sums due and owing" and contended that because of that, by the Moneylenders Act, the transaction between the plaintiffs and the defendant was "null and void, unenforceable and illegal ..."

On 24 July 1980 the plaintiffs conceded that interest had been charged and amended their statement of claim to show that their claim was in respect of the balance long overdue for goods sold and delivered together with interest imposed on the alleged overdue amount at 1% p.m. from February to June 1979.

On 15 September 1980 the defendant amended the statement of defence. Again the complaint was only in respect of the interest charged and again the defence was simply an invocation of the Moneylenders Act.

Then on 7 April 1981 the defendant again amended his statement of defence. This time, on top of complaining about the interest charged, the defendant brought in a new contention that when he made purchase orders in writing he had instructed that the goods supplied should be delivered in lorries belonging either to the plaintiffs or to one M/s. Leng Thong. He then referred to a number of delivery orders and contended that the goods the subject of those delivery orders were never received by the defendant. He further relied on the plaintiffs' letter of 28 September 1978 and contended that pursuant to that letter he was entitled to a 5% discount which the plaintiffs had not given him credit for. He concluded that in fact he had overpaid the plaintiffs by RM19,087.91. He counterclaimed for that amount together with a further RM1,272.64 said to be the amount due by virtue of the said 5% discount.

The plaintiffs in turn contended that they had given the defendant 60 days credit facilities and had from the beginning stated in the bills sent to the defendant that interest would be charged on amounts unpaid for more than 60 days. They denied that there was any instructions that goods could only be delivered on lorries belonging to Leng Tong or to the plaintiffs. As to the 5% discount they pointed out that by the letter of 28 September 1978 the defendant was only entitled to the discount if advance payments were made. No advance payments had been made.

On 29 July 1985 when the matter finally came on for hearing there had been a change of Counsel as well as solicitor in respect of the defendant. The newly appointed Counsel obtained leave to yet again amend the statement of defence and counterclaim by deleting the amount of RM19,087.91 said to have been overpaid and substituting the deletion with the amount RM47,243.28.

The plaintiffs also made a last minute amendment. They obtained leave to and added a new prayer in their statement of claim praying for interest on RM23,650.35 at 1% p.m. from 1 July 1979 until judgment.

5% discount

As to the 5% discount the terms of the plaintiffs' letter of 28 September 1978 are clear. The defendant was to be entitled to the discount if advance payments were made. It is not in dispute that no such advance payments were made. When confronted with the terms of the letter of 28 September 1978 the defendant said that in fact he had been told by PW1 prior to his entering into any transaction that a 5% discount would be given and that offer was not qualified as set out in the letter of 28 September 1978. However it has been seen it was on what was stated in that letter that the defendant had based his cause of action for the 5% discount. How the RM1,272.64 (which is 5% of RM25,458.80) was arrived at has not been explained. I could find no merit whatsoever in the claim for a discount as prayed or at all.

Interest claimed

As to the issue in respect of the interest claimed by the plaintiffs, the first aspect to be dealt with is the defence based on the Moneylenders Act. Counsel for the defence did not touch on it at all in her final submission no doubt because clearly there was no lending of money. Even if the plaintiffs were not entitled to charge interest their doing so does not entitle the defendant to get out of the liability in respect of any balance found for goods sold and delivered by any provisions of the Moneylenders Act.

The other aspect of the interest claimed is whether the plaintiffs were and are entitled to the interest claimed or at all.

The testimony on behalf of the plaintiffs is to the effect that they had caused to be stamped on the original copy of the very first bill sent to the defendant and on the original copy of all subsequent bills sent, the statement that "credit will be stopped on account exceeding 60 days and interest at 1% p.m. will be charged." The only way this could have been refuted was for the defendant to have produced the original copies. This was not done. Further there is no acceptable evidence of the defendant protesting this endorsement on the bills. In fact he continued to purchase goods and from time to time made payments to account. From February 1979 onwards the plaintiffs in fact imposed interest at 1% p.m. on what they said was overdue amounts and billed the defendant for such interest every month thereafter. After receipt of such a bill the defendant is seen to have made one payment of RM30,000 to the plaintiffs. Again there is no evidence of any protest by the defendant in respect of such bills. The first complaint made by him on this was when he filed his statement of defence in which he admitted that "The plaintiffs have on several occasions imposed an interest charge of 1% (one percent) on sums due and owing" and went on not to deny their right to do so but to invoke the Moneylenders Act.

In my judgment the inference to be drawn from the conduct of the defendant is that he accepted without protest that he would be charged interest at 1% p.m. on the due payment.

In any event, s. 11 of the Civil Law Act 1956 gives the Court the discretion to award interest on a claim for any debt or damages at suitable rates from any date after the cause of action arose.

Following the principles set out in *Wong Chong Chow v. Pan Malaysian Cement Works Bhd.* [1980] 2 MLJ 75 and 78 B and in *Woon Hoe Kan & Son Sdn. Bhd. v. Bandaraya Dev. Bhd.* [1974] 1 MLJ 24 at 25, I am of the view that either by contract or in any event by

virtue of s. 11 of the Civil Law Act the plaintiffs are entitled to interest at 1% p.m. (which in all the circumstances is a reasonable rate) on any amount found due as from the date such amount was due until judgment and thereafter at the rate as prayed in the statement of claim (6% p.a.).

Balance due on goods sold and delivered

As to the alleged balance due for goods said to have been sold and delivered, the defendant has as he is entitled to, insisted on the plaintiffs strictly proving their claim. This the plaintiffs proceeded to do by evidence showing that they had a systematic method of dealing with orders made. Each lorry load of material that left the quarry was checked by a counter clerk (who prepared a delivery order), a weighbridge clerk (who prepared the weighbridge ticket) and a checker (who allowed the lorry to leave the quarry gates). The check was in respect of the type of material in the lorry and the lorry number. At the weighbridge the weight of the load was also recorded. In the case of lorries said to have been sent by the customer, the lorry driver's acknowledgement of the goods was obtained. In the case of goods sent by the plaintiffs' drivers the acknowledgement of receipt was that of the recipient at the building site to which the goods were sent. At the end of the day the supervisor at the quarry double-checks the delivery orders on the basis of which he prepares the bills to be sent to the customer. In the case of the customers' lorries, the driver is given a copy of the relevant delivery order. It was presumed that he handed it over to his principal or master, the customer. In the case of plaintiffs' lorries a copy of the delivery order is given to the recipient at the site who is assumed to be a servant or agent of the customer.

This system is not fool-proof - the drivers could steal the goods or in any event not deliver the load to the customer. The recipient at the site could accept the load and then steal it. The check that discovers the non-delivery of goods are the bills. Bills were sent on a monthly basis to the customer. The particulars given in the bill included the type of material supplied, the tonnage involved, the price per ton and the total cost. Together with the bills there was sent a monthly statement of account which gave particulars of the balance brought forward, payments made in the relevant month and particulars of bills sent (with the number of the bill stated) in that month and showed the balance outstanding as at the end of month. A copy of each of the bills and each of the statements sent to the defendant was produced. If goods stated to have been delivered in a particular bill had in fact not been received by the defendant it is not unreasonable to expect him within a reasonable time to have drawn the attention of the plaintiffs to the matter.

The defendant testified that he had telephoned and complained to PW1. He could not say as to which bills he had complained about. He was vague about what he complained about. He admitted that he had not sent written protests or complaints in respect of goods not delivered but billed or in respect of over-billing, or in respect of interest charged or in respect of his not having been given the 5% discount that he claims he was entitled to. He said it was not his style of doing business to send in written complaints. However there was one instance of a driver of the plaintiffs apparently having asked the defendant for "coffee" money. The defendant not only refused to pay him such coffee money but went on to write out a complaint on the copy of the relevant delivery order which copy has been produced as an exhibit. In my judgment if the defendant could have taken such pains over a matter of that type, if he could send in a written protest about it, he would have done more - he would certainly have sent in written complaints - had the plaintiffs billed him for goods that he had not been supplied with or having billed him refused to reduce the amount billed after an oral complaint that the goods had not been received.

It is significant that the only defence he initially could come up with when the plaintiffs finally sued him was the moneylending defence.

I accept the testimony of the plaintiffs' witnesses that the defendant had not placed any restrictions on the lorries to be used and had never complained of non-delivery of goods.

I am more than satisfied that he had been duly supplied with all the goods that the plaintiffs had billed him for and that he was billed on a monthly basis, and that he was supplied with monthly statements and that not having protested the bills when they were delivered to him he can be said to be *estopped* from doing so now. The facts in this case show that there was an account stated as it were between the parties.

Copies of all the delivery orders save 38 that the defendant had insisted on being produced were duly produced either by the maker or where the maker's whereabouts were not known and as such he was not available, by the supervisor PW2 under whom at the relevant time the marker had worked and who was in charge of the documents. In respect of the 38 the testimony was that the documents were mislaid but in lieu of them the relevant weighbridge tickets were produced.

Apart from pointing out that one delivery order did not have the recipient's initial the defendant could make nothing of those delivery orders. As to that one delivery order without a signature, the Court is not concerned with *bagatelles.* The **De Minimis Rule** serves to give no weight at all to that one delivery order out of over a thousand delivery orders.

I am satisfied that the plaintiffs have proven their claim and that the defendant has not thrown any doubts on the plaintiffs' claim or on any part thereof. In my judgment the defendant has been shown to be a thoroughly dishonest businessman who would go to great lengths to try to evade paying his debts.

I have no hesitation in giving the plaintiffs judgment as prayed in prayer 1, 1(a), 2 and 3 of the statement of claim. The counterclaim is dismissed with costs.

Also found at [1988] 1 CLJ 488